RECORDS AND BRIEFS

Supreme Court, U.S.
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NO. 16-373

In the
Supreme Court of the United States

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM,

Petitioner,

v.

ANZ SECURITIES, INC., et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

In *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554 (1974), this Court held that the filing of a putative class action suspends applicable statutes of limitations for any party that would have been a member of the class. As a result, a later-filed individual action by a would-be class member is not time-barred even if it is filed after the applicable limitations period has run. Unlike statutes of *limitations*, however, statutes of *repose* "put[] an outer limit on the right to bring a civil action," and thus serve as an "absolute ... bar" to the defendant's liability. *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2182-83 (2014). Since this Court decided *Waldburger*, every circuit court to consider the issue has held that *American Pipe* tolling does not apply to a statute of repose, like the three-year limit in Section 13 of the Securities Act.

Although the petition in this case set forth two questions presented, this Court granted certiorari limited to a single question:

Does the filing of a putative class action serve, under the *American Pipe* rule, to satisfy the three-year time limitation in Section 13 of the Securities Act with respect to the claims of putative class members?

CORPORATE DISCLOSURE STATEMENT

Respondent ANZ Securities, Inc. is an indirectly wholly owned subsidiary of Australia and New Zealand Banking Group Limited ("ANZ"). Upon information and belief, ANZ has no parent company, and no publicly traded company owns 10% or more of its stock.

BFA Tenedora de Acciones, S.A.U. (formerly Banco Financiero y de Ahorros, S.A.U.) ("BFA") owns 50% or more of Respondent Bankia, S.A. and BFA is wholly owned by the Fondo de Reestructuración Ordenada Bancaria, an entity overseeing the recapitalization and restructuring of the Spanish banking system. No publicly traded company owns 10% or more of Bankia, S.A.

Respondent BBVA Securities Inc. is a wholly owned subsidiary of BBVA Compass Bancshares, Inc., which is a wholly owned subsidiary of Banco Bilbao Vizcaya Argentaria, S.A. No publicly held corporation owns 10% or more of Banco Bilbao Vizcaya Argentaria, S.A.

Respondent BMO Capital Markets Corp., formerly known as Harris Nesbitt Corp., is indirectly wholly owned by Bank of Montreal. No publicly held corporation owns 10% or more of Bank of Montreal.

On November 30, 2011, Fortis Securities LLC changed its name to BNP Paribas FS, LLC. Respondent BNP Paribas FS, LLC is a wholly-owned, indirect subsidiary of BNP Paribas. BNP Paribas is a publicly traded company organized under the laws of France. BNP Paribas has no parent company and no publicly-held corporation owns 10% or more of its shares.

Respondent BNP Paribas is a publicly traded company organized under the laws of France. BNP Paribas has no parent company and no publicly held corporation owns 10% or more of its shares.

Respondent BNY Mellon Capital Markets, LLC (which was formerly named Mellon Financial Markets, LLC and is the successor-in-interest to BNY Capital Markets, Inc.) is a wholly owned subsidiary of The Bank of New York Mellon Corporation. No publicly held corporation owns 10% or more of The Bank of New York Mellon Corporation.

Respondent CIBC World Markets Corp. is a wholly owned subsidiary of Canadian Imperial Bank of Commerce, which is a publicly traded company. No publicly held company owns 10% or more of Canadian Imperial Bank of Commerce's stock.

Respondent Citigroup Global Markets Inc. is wholly-owned by Citigroup Financial Products Inc., which is wholly-owned by Citigroup Global Markets Holdings Inc., which is wholly-owned by Citigroup Inc.

Respondent Daiwa Capital Markets Europe Limited (f/k/a Daiwa Securities SMBC Europe Limited) is a wholly owned subsidiary of Daiwa International Holdings Inc., which is a wholly owned subsidiary of Daiwa Securities Group Inc. No publicly traded company owns 10% or more of the stock of Daiwa Securities Group Inc.

Respondent DZ Financial Markets LLC is a wholly owned subsidiary of DZ Bank AG. DZ Bank AG does not have any corporate or other parent

corporation or any publicly held corporation that owns 10% or more of its stock.

Respondent HSBC Securities (USA) Inc. is wholly owned by HSBC Markets (USA) Inc., which, in turn, is wholly owned by HSBC Investments (North America) Inc., which, in turn, is wholly owned by HSBC North America Holdings Inc., which, in turn, is indirectly held by HSBC Holdings plc. Upon information and belief, no publicly traded company owns more than 10% of the stock of HSBC Holdings plc.

Respondent ING Financial Markets LLC is wholly owned by ING Financial Holdings Corporation, which, in turn, is wholly owned by ING Bank N.V., which, in turn, is wholly owned by ING Groep N.V. No publicly traded company owns more than 10% of the shares of ING Groep N.V.

The parent company of Respondent Mizuho Securities USA Inc. is Mizuho Securities Co., Ltd.; the parent company of Mizuho Securities Co., Ltd., is Mizuho Financial Group, Inc.; no publicly held corporation owns 10% or more of Mizuho Securities USA Inc.'s stock.

Respondent Muriel Siebert & Co., Inc. is a wholly owned subsidiary of Siebert Financial Corp. No publicly traded corporation owns 10% or more of Siebert Financial Corp.

Respondent nabSecurities, LLC (f/k/a National Australia Capital Markets, LLC) is a wholly owned subsidiary of National Australia Bank Limited, a publicly traded company on the Australian Stock Exchange. As of October 31, 2015, the companies that own 10% or more of National Australia Bank

Limited's stock are HSBC Custody Nominees (Australia) Limited and JP Morgan Nominees Australia Limited.

Respondent Natixis Bleichroeder Inc., is now known as Natixis Securities Americas LLC. Its sole member is Natixis North America LLC. Natixis North America LLC is an indirectly wholly owned subsidiary of Natixis S.A., a public company that is 71% owned by Groupe BPCE. No other publicly held corporation owns 10% or more of Natixis S.A.'s stock.

Respondent RBC Capital Markets, LLC (f/k/a RBC Capital Markets Corporation) is an indirect wholly-owned subsidiary of Royal Bank of Canada, which is publicly traded on the New York Stock Exchange and the Toronto Stock Exchange.

Respondent RBS Securities Inc. (formerly named Greenwich Capital Markets, Inc., incorrectly named herein as Greenwich Capital Markets a/k/a RBS Greenwich Capital) is a wholly owned subsidiary of RBS Holdings USA Inc. (formerly named Greenwich Capital Holdings, Inc.). No publicly held company owns 10% or more of RBS Securities Inc.'s stock. RBS Holdings USA Inc. is a privately held corporation that is an indirect but wholly owned subsidiary of The Royal Bank of Scotland Group plc ("RBS Group"). Other than RBS Group, no publicly held company owns 10% or more of RBS Holdings USA Inc.'s stock. No publicly held company owns 10% or more of RBS Group's stock.

Respondent RBS WCS Holding Company, the legal successor to defendant ABN AMRO Inc., is wholly owned by The Royal Bank of Scotland N.V., which is wholly owned by RBS Holdings N.V., which

is wholly owned by RFS Holdings B.V., which is approximately 97.7% owned by RBS Group. No publicly held corporation owns 10% or more of the stock of RBS Group.

Respondent Santander Investment Securities, Inc. is an indirect, wholly owned subsidiary of Banco Santander, S.A., which is a publicly traded corporation. There is no publicly traded corporation that owns more than 10% of the stock of Banco Santander, S.A.

Respondent Scotia Capital (USA) Inc. is a wholly owned subsidiary of Scotia Holdings (US) Inc. Scotia Holdings (US) Inc. is wholly owned by BNS Investments Inc., which is 100% owned by the Bank of Nova Scotia. No publicly traded company owns 10% or more of the Bank of Nova Scotia.

Respondent SG Americas Securities, LLC is a limited liability company and wholly owned by SG Americas Securities Holdings, LLC. SG Americas Securities Holdings, LLC is a wholly owned subsidiary of Société Générale, S.A., which is a publicly traded company. Upon information and belief, no other publicly held corporation owns 10% or more of Société Générale, S.A.

Respondent Sovereign Securities Corporation, LLC is a wholly owned subsidiary of Santander Bank, N.A. (formerly known as Sovereign Bank), which, in turn, is a wholly owned subsidiary of Santander Holdings USA, Inc. (formerly known as Sovereign Bancorp, Inc.), which, in turn, is wholly owned by Banco Santander, S.A., a publicly traded corporation organized under the laws of the Kingdom of Spain. There is no publicly traded corporation that

owns more than 10% of the stock of Banco Santander, S.A.

Respondent SunTrust Capital Markets Inc. (n/k/a SunTrust Robinson Humphrey, Inc.) is a wholly owned subsidiary of SunTrust Banks, Inc. As of June 10, 2015, BlackRock, Inc., a publicly traded company, beneficially owned 11.4% of the common stock of SunTrust Banks, Inc.

Respondent Utendahl Capital Partners, L.P. is a Delaware limited partnership and Utendahl Partners, L.P. is the general partner. Utendahl Partners, L.P. has no subsidiaries or affiliates that are publicly held, and no publicly held corporation owns 10% or more of the stock of Utendahl Partners, L.P.

Respondent Wachovia Securities, LLC (n/k/a Wells Fargo Advisors, LLC) is a wholly owned indirect subsidiary of Wells Fargo & Company, a publicly traded corporation organized under the laws of the State of Delaware. Berkshire Hathaway Inc. owns more than 10 percent of the shares of Wells Fargo & Company.

Respondent Wells Fargo Securities, LLC, a limited liability company organized under the laws of Delaware, is a wholly-owned subsidiary of EVEREN Capital Corp. EVEREN Capital Corp. is a wholly owned subsidiary of Wells Fargo & Company, a publicly traded corporation organized under the laws of the State of Delaware. Berkshire Hathaway Inc. owns more than 10 percent of the shares of Wells Fargo & Company.

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INTRODUCTION

Section 13 of the Securities Act of 1933 sets forth a one-year statute of limitations and then provides: "In no event shall any ... action" asserting a securities claim under Section 11 of the Act "be brought ... more than three years after the security was bona fide offered to the public." 15 U.S.C. §77m. The question in this case is whether the statutory phrase "[i]n no event" actually means "in some events," based on a judge-made rule designed to facilitate class actions. It does not. Section 13's three-year bar is a paradigmatic statute of repose that operates as an outer limit "on the right to bring a civil action" that may not be extended "for any reason," "even in cases of extraordinary circumstances." *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2182-83 (2014).

Nothing in *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), is to the contrary. *American Pipe* held that the filing of a putative class action tolls applicable statutes of *limitations* for individual suits brought by plaintiffs who would have been members of the class. *Id.* at 554-55. That judge-made tolling rule is consistent with the longstanding tradition of extending statutes of limitations via judge-made rules like equitable tolling. But there is no comparable tradition of allowing judge-made rules to override statutes of *repose*, such as the three-year bar in Section 13. To the contrary, the immunity of statutes of repose from such judge-made rules is a large part of what distinguishes statutes of repose from statutes of limitations. Indeed, this Court has held in no

uncertain terms that "[s]tatutes of limitations, *but not statutes of repose*, are subject to equitable tolling." *Waldburger*, 134 S. Ct. at 2183 (emphasis added). That is what allows statutes of repose to give true repose.

Here, Petitioner filed an individual Section 11 action "more than three years after the security was bona fide offered to the public." 15 U.S.C. §77m. Petitioner nonetheless attempts to escape the plain text of Section 13 with a three-part argument. Petitioner opens with a policy argument that the "interests" underlying *American Pipe* apply equally to statutes of limitations and repose, follows with a case-specific argument on which this Court *expressly declined* to grant certiorari, and finally, nearly 40 pages into its brief, finishes by addressing the actual question presented and arguing that *American Pipe* tolling should apply to Section 13's three-year statute of repose.

Petitioner's arguments are profoundly flawed as a matter of both procedure and substance. This Court should not tolerate Petitioner's brazen end-run around the Court's order granting certiorari "limited to Question 1 presented by the petition." Order List (Jan. 13, 2017). Nor can Petitioner's policy arguments justify a judicial override of Congress' unequivocal three-year time limit. Petitioner predicts a torrent of protective filings if the Court affirms the majority approach of the Circuits. But Petitioner identifies zero evidence that its parade of horribles has *actually* come to pass in the Second Circuit, which handles the bulk of the Nation's securities litigation and has been living with the

IndyMac rule since 2013. Nor is there any due process problem with applying statutes of repose to class actions. Class members will still have a right to opt out, and to the extent the statute of repose incentivizes them to stay in the class and fight for a better classwide resolution, the entire class stands to benefit.

Petitioner's belated and relatively brief arguments addressing the actual question presented fare no better. Petitioner suggests that the three-year bar in Section 13 is a statute of limitations rather than a statute of repose, but that runs headlong into Section 13's plain text and this Court's holding that "[t]he 3-year limit is a period of repose inconsistent with tolling." *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991). Petitioner concedes, as it must, that if Section 13 is a statute of repose, then it is not subject to equitable tolling. Petitioner gamely tries to deny that *American Pipe* is a strain of equitable tolling, but that is both wrong and unavailing. Even if *American Pipe* were a form of "legal tolling" emanating from Rule 23, it still could not extend the three-year repose period in Section 13. Statutes of repose confer *substantive* rights to be free from suit after a specified period, and the Rules Enabling Act ensures that the Federal Rules of Civil Procedure will not "abridge, enlarge or modify any substantive right." 28 U.S.C. §2072(b). In the end, the doctrinal path for deciding the question on which this Court granted certiorari is straightforward: Section 13 is a statute of repose, and statutes of repose confer substantive rights, which are not subject to judge-made tolling.

STATEMENT OF THE CASE

A. Section 13's One-Year Statute of Limitations and Three-Year Statute of Repose

1. Under Section 11 of the Securities Act, purchasers of certain registered securities may bring suit against, *inter alia*, "every underwriter with respect to such security," for material misstatements or omissions in the securities' registration statements. 15 U.S.C. §77k(a). Unlike other provisions in the securities laws that require a showing of scienter, Section 11 imposes strict liability for material omissions or misrepresentations. *See Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318, 1331 n.11 (2015).

That strict and potentially broad liability is ameliorated by the reality that a private party's right to sue under under Section 11 does not endure in perpetuity. Actions asserting Section 11 claims are subject to two separate time bars set forth in Section 13 of the Securities Act, which provides in relevant part:

> No action shall be maintained to enforce any liability created under [Section 11] ... unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence.... *In no event* shall any such action be brought to enforce a liability created under [Section 11] ... more than three years after the security was bona fide offered to the public....

15 U.S.C. §77m (emphasis added).

Section 13 thus contains a two-tiered structure of time limits. The first sentence creates a one-year statute of *limitations*, which begins to run only when the plaintiff discovers (or should have discovered) the untrue statement or omission. The second sentence, in contrast, creates a statute of *repose* that places a three-year outer limit on "any" Section 11 "action" against, *e.g.*, an underwriter, and employs the absolute "[i]n no event" formulation. A newly-filed action must satisfy both these time limits.

The certainty that Section 13's three-year repose period provides is particularly important to underwriters like Respondents. Underwriting is "central to the proper functioning of well-regulated capital markets." *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 276 (2007). Moreover, unlike insiders who typically risk liability only with respect to their own securities (over which they have substantial control), underwriters face potential litigation for every security they underwrite, which for active underwriters can be hundreds, if not thousands, of securities per year (even though many of the relevant variables are outside the underwriters' control). Section 13's three-year statute of repose ensures that underwriters are not deterred by the prospect of stale claims involving securities underwritten years earlier.

2. Congress did not arrive at this two-tiered structure by accident. The initial draft of what would become the Securities Act lacked any limitations or repose provisions. *See* H.R. 4314, 73d Cong. (1933); S. 875, 73d Cong. (1933). But legislators quickly

realized the danger in allowing "unprincipled lawyer[s]" to file securities claims in perpetuity. *Federal Securities Act: Hearing on H.R. 4314 Before the H. Comm. on Interstate and Foreign Commerce*, 73d Cong. 169 (1933) (statement of William C. Breed). Various solutions, including a single five-year limitations period, *see* S. 875, 73d Cong. §9 (1933), were considered, but Congress ultimately decided that a two-tiered structure would best serve the interests the statute sought to protect. *See* H.R. 5480, 73d Cong. §13 (1933). When the Securities Act first became law, Section 13 imposed a two-year statute of limitations (which ran from the date the violation was or should have been discovered) plus an absolute time bar that cut off claims ten years after a security was first offered to the public. *See* Pub. L. No. 73-22, §13, 48 Stat. 74, 84 (1933).

The original version of the Securities Act generated numerous objections from members of both industry and government, which led Congress to consider amendments to the statute after just one year. Some legislators proposed scrapping Section 13's two-tiered structure altogether and replacing it with a single time limit running from the date of the misrepresentation or omission. *See* 78 Cong. Rec. 8198-8203 (1934). But Congress resoundingly rejected such proposals, viewing the two-tiered framework as "just and fair to both sides." *Id.* at 8200. On the one hand, the limitations period "preserve[d] the right of a [plaintiff] who might not discover the falsity of a statement" within one year, because fraud may take longer to discover. *Id.* at 8200-01. On the other hand, a potential defendant ought to have a measure of repose at some point, lest

there be no "end [to] his fear, or the fear of his estate, of a suit." *Id.* at 8200.

Moreover, because an unduly long repose period could, *inter alia*, "deter" qualified candidates from "serving on boards of directors," Congress not only retained the two-tiered time limits, but *shortened* both limits to one and three years, respectively (from two and ten years). *See id.* at 8200-03. Although the Securities Act has subsequently been amended on various occasions, Section 13 and its two-tiered, one-and-three structure have remained unchanged for eight decades.

B. The Lehman Brothers Class Action

This case arises out of the bankruptcy of Lehman Brothers Holdings Inc., formerly one of the largest investment banks in the world. After the value of Lehman's stock began declining in early 2008, investors filed several securities fraud class actions against Lehman and certain of its officers and directors under Section 10(b) of the Securities Exchange Act of 1934. *See, e.g.*, *Se. Pa. Transp. Auth. v. Lehman Bros. Holdings, Inc.*, No. 08-cv-02431 (N.D. Ill.); *Operative Plasterers & Cement Masons Int'l Assoc. Local 262 Annuity Fund v. Lehman Bros. Holdings, Inc.*, No. 08-cv-05523-LAK-GWG (S.D.N.Y.).

Lehman filed for bankruptcy protection on September 15, 2008, which spurred still more litigation, including Securities Act actions naming underwriters of certain Lehman debt offerings as defendants. *See, e.g.*, *Stark v. Callan*, No. 08-cv-09793-LAK (S.D.N.Y. Dec. 2, 2008), Dkt.8. All of those actions were eventually consolidated in a

single, multi-district litigation in the Southern District of New York (the "Class Action"). *See In re Lehman Bros.*, No. 09-md-02017-LAK-GWG (S.D.N.Y. filed Jan. 9, 2009). The ultimate, operative complaint in the Class Action asserted, *inter alia*, Securities Act claims concerning Lehman debt security offerings involving dozens of purported underwriters, as well as Exchange Act claims against certain Lehman officers and directors. *Id.*, Dkt.30.

C. Petitioner's Individual Action

Petitioner CalPERS, which oversees nearly $300 billion in assets, is one of the largest and most sophisticated institutional investors in the world. It is also a frequent participant in securities litigation, and has recovered hundreds of millions of dollars in settlements in cases arising out of the financial crisis.

On February 7, 2011, more than three years after the relevant Lehman debt offerings were issued and before a class certification motion had even been filed in the New York litigation, Petitioner filed this individual action in the Northern District of California. *See Cal. Pub. Emps.' Ret. Sys. v. Fuld*, No. 11-cv-00562-EDL (N.D. Cal.). Petitioner's suit named as defendants not only Lehman officers and directors, but also numerous underwriters of Lehman debt securities. Shortly thereafter, Petitioner's individual action was transferred to the Southern District of New York and consolidated with the earlier-filed litigation for pretrial purposes. *See id.*, Dkt.5.

While Petitioner initially asserted various securities claims (some timely, others not), all but five of Petitioner's claims have since been resolved

via settlements that netted Petitioner far more than the corresponding class recoveries. *See, e.g.*, Press Release, *CalPERS Achieves $12.75M Recovery from Ernst & Young LLP* (May 5, 2014), http://bit.ly/2nb1z28. Petitioner's remaining claims all arise under Section 11 of the Securities Act, and all allege misrepresentations or omissions by various underwriters of Lehman securities in registration statements that were issued to the public between July 2007 and January 2008—*i.e.*, more than three years before its individual action was filed in California.

D. Petitioner Opts Out of the Class Action With Full Awareness That Its Individual Action Could Be Dismissed as Untimely

Petitioner filed its individual action before a class certification motion had been filed, and more than a year before it faced an opt-out decision vis-à-vis the Class Action settlement.[1] Nonetheless, Petitioner sought to benefit from the Class Action for tolling purposes. There was never any question that, standing alone, Petitioner's individual action under Section 11 was time-barred by Section 13's three-year statute of repose. Thus, the timeliness of Petitioner's separately filed Section 11 claims depended entirely

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[1] Petitioner's self-congratulatory press releases about its settlements with other defendants underscore that its strategy was designed to obtain a better recovery than would be provided by remaining in the Class Action. *See* Press Release, *supra* (boasting that Petitioner's settlement with Ernst & Young "is far larger than the recovery CalPERS would have obtained had it remained in the class action").

on the argument that, under *American Pipe*, the timely filing of the Class Action suspended Section 13's repose period as to Petitioner's Section 11 claims, and thus revived Petitioner's otherwise-moribund individual action. *See Cal. Pub. Emps.' Ret. Sys. v. Fuld*, No. 11-cv-01281-LAK (S.D.N.Y. Feb. 7, 2011), Dkt.1-1 at 52.

In early 2011, the district judge overseeing both the Class Action and Petitioner's transferred individual action held, in three separate opinions, that "statutes of repose, including the three-year period established by Section 13 of the Securities Act, are not tolled by the pendency of putative class actions." *In re Lehman Bros. Sec. & ERISA Litig.*, 800 F. Supp. 2d 477, 481 (S.D.N.Y. 2011); *accord In re Lehman Bros. Sec. & ERISA Litig.*, 799 F. Supp. 2d 258, 310 (S.D.N.Y. 2011); *In re IndyMac Mortg.-Backed Sec. Litig.*, 793 F. Supp. 2d 637, 642 (S.D.N.Y. 2011). Thus, at the time Petitioner formally opted out of the settlement of the Class Action in 2012, *see In re Lehman Bros.*, No. 09-md-02017-LAK-GWG (S.D.N.Y. May 2, 2012), Dkt.894, Petitioner knew to a certainty that the district court would dismiss its individual Section 11 suit as time-barred. Undeterred, Petitioner, a sophisticated investor and experienced litigant, was willing to gamble away the certain recovery it would have received in the Class Action settlement to pursue an even *greater* individual recovery, despite the risk that the appellate courts would affirm the district court's inevitable dismissal of Petitioner's individual action as untimely.

E. The District Court Dismisses Petitioner's Individual Suit as Time-Barred and the Second Circuit Affirms

Petitioner did not have to wait for long for its tactical gambit to be tested. Various defendants filed motions to dismiss Petitioner's individual Section 11 action as time-barred, and the district court granted one such motion on October 5, 2012. Consistent with its three 2011 decisions on this issue, the district court held that "*American Pipe* tolling does not apply to the statute of repose set forth in Section 13 of the Securities Act." Pet.App.11a. After the Second Circuit adopted the same view in *Police & Fire Retirement System of Detroit v. IndyMac MBS, Inc.* ("*IndyMac*"), 721 F.3d 95 (2d Cir. 2013), the district court promptly dismissed Petitioner's remaining Section 11 claims as untimely, Pet.App.7a.

The Second Circuit unanimously affirmed. Petitioner argued that *IndyMac* was not controlling because, unlike in *IndyMac*, the named plaintiffs in the Class Action here had standing to assert Petitioner's dismissed claims. The Second Circuit disagreed, explaining that the *IndyMac* rule "derived from two longstanding principles" that apply regardless of "whether the named plaintiffs have proper standing to assert claims on behalf of a class":

> First, if *American Pipe* is grounded in equity, its tolling rule cannot affect a legislatively enacted statute of repose.... Second, if *American Pipe* establishes a "legal" tolling principle grounded in Rule 23, to apply it to a statute of repose would violate the Rules Enabling Act by permitting a procedural

> rule to abridge the substantive rights created by statutes of repose.

Pet.App.3a-4a (citations omitted).

The Second Circuit also rejected Petitioner's alternative argument that because it was a member of the putative class before it opted out, its individual claims were timely "brought" for purposes of Section 13 without the need for tolling. As the court explained, "if it were true that a putative class member's claims were essentially 'filed' in the putative class complaint, there would be no need for *American Pipe* tolling at all; any putative class complaint would count as a legitimate 'filing' of all putative class members' claims within the limitations period." Pet.App.4a.

Finally, the court rejected Petitioner's argument that tolling of the three-year statute of repose was needed to protect its "due process" right to opt out of the Class Action. The court noted that "[t]he due process protections of Rule 23 are directed at preventing a putative class member from being bound by a judgment without her consent." Pet.App.5a. An absent class member's opt-out right "does not confer *extra* benefits to a plaintiff's individual action" or guarantee the existence of a viable, timely individual claim to opt into; instead, the opt-out right "merely ensures that each putative class member retains the ability to act independently of the class action if she so elects." Pet.App.5a.

F. This Court Grants Certiorari Only as to the First Question Presented

Petitioner sought this Court's review of two distinct questions: (1) Whether the filing of a

putative class action serves, under the *American Pipe* rule, to satisfy Section 13's three-year statute of repose with respect to putative class members' individual claims; and (2) whether, even if not, a member of a timely filed putative class action may bring an otherwise-untimely individual action asserting the same claims. Pet.i. As to the second question, Petitioner argued that "no tolling was required" at all because "the class member's action was timely commenced and maintained without interruption." Pet.26-27.

This Court had multiple petitions before it raising similar issues, with some petitions raising a single question and others presenting multiple questions. From those petitions, the Court granted certiorari in this case but expressly declined to address the second question. *See* Order List (Jan. 13, 2017) ("The petition for a writ of certiorari is granted *limited to Question 1 presented by the petition.*" (emphasis added)).

SUMMARY OF ARGUMENT

I. Section 13's text, two-tiered structure, and history make clear that whereas its one-year provision is a classic statute of limitations (which may be tolled in certain circumstances), its three-year provision is a "period of repose inconsistent with tolling." *Lampf*, 501 U.S. at 363. The language employed in this three-year provision is unequivocal: "*In no event*" may an action under Section 11 be brought more than three years after the offering of the security. 15 U.S.C. §77m (emphasis added). Moreover, given its placement alongside an extendable one-year limitations provision, the three-

year provision "can have no significance ... other than to impose an outside limit" on Section 11 suits. *Lampf*, 501 U.S. at 363. The legislative history underscores that Section 13's three-year outer limit was intended as a statute of repose.

Statutes of repose such as Section 13 are not subject to judicial extension or equitable tolling, "even in cases of extraordinary circumstances." *Waldburger*, 134 S. Ct. at 2183. Unlike statutes of limitations, statutes of repose serve the "distinct" purpose of establishing an absolute, "outer limit on the right to bring a civil action"—*i.e.*, "'a cutoff'" of liability that may not be judicially tolled or extended for any reason. *Id.* at 2182-83 (quoting *Lampf*, 501 U.S. at 363). Thus, unlike a statute of limitations, "'a repose period is fixed[,] and its expiration will not be delayed by estoppel or tolling.'" *Id.* at 2187.

American Pipe tolling does not apply to statutes of repose, like that included in Section 13. *American Pipe*'s "tolling rule," 414 U.S. at 555, is a rule of *equitable* tolling. This Court relied on traditional equitable considerations in reaching its holding, and has subsequently characterized *American Pipe* as an "equitable tolling" doctrine. *See, e.g.*, *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 & n.3 (1990). That should be the end of the matter, as "[s]tatutes of limitations, *but not statutes of repose*, are subject to equitable tolling." *Waldburger*, 134 S. Ct. at 2183 (emphasis added).

Conceding (as it must) that statutes of repose are not subject to equitable tolling, Petitioner attempts to reconceptualize *American Pipe* as a "legal" tolling rule that emanates from Rule 23. But that argument

suffers two fatal defects. First, Rule 23 says nothing at all about tolling, and Petitioner fails to identify anything in the text of Rule 23 that *American Pipe* was purportedly interpreting. This effort to reconceptualize *American Pipe* as something other than a species of equitable tolling is simply wishful thinking. Second, even if Petitioner were correct that *American Pipe* established a "legal" tolling rule based on Rule 23, that judicial gloss on a federal rule could not override Section 13's three-year statute of repose. This Court has made clear that statutes of repose confer *substantive* rights on defendants to be free from suit after a specified period. And under the Rules Enabling Act, courts may not apply the Federal Rules of Civil Procedure in a manner that would "abridge, enlarge or modify any substantive right." 28 U.S.C. §2072(b).

II. In implicit recognition that there are insurmountable doctrinal obstacles to extending *American Pipe* to statutes of repose, Petitioner argues in the alternative that its individual action was timely "wholly apart from the question of tolling." Pet.Br.31. This argument is procedurally improper and substantively unavailing.

Petitioner describes this argument as the "easiest path to reversal," Pet.Br.11, but that "path" faces a rather significant roadblock: namely, the fact that the Court *expressly declined to grant certiorari* on this issue. The certiorari petition presented two questions, but the Court limited its grant to the first question. Undeterred, Petitioner has now fully briefed both questions (leading with the non-granted question, no less) despite this Court's explicit

instructions to the contrary. The Court should not tolerate such brazen disregard for its clear instructions in the order granting certiorari. *Cf.* Order, *Visa, Inc. v. Osborn*, No. 15-961 (Nov. 17, 2016) (dismissing writ of certiorari as improvidently granted where "petitioners 'chose to rely on a different argument' in their merits briefing" from the question presented in the petition).

In all events, Petitioner's non-granted argument is meritless. Petitioner's theory requires accepting the rather counterintuitive premise that an individual suit filed in California for the sole purpose of asserting Petitioner's individual claims was, in fact, the same "action" as a putative class action filed by different plaintiffs in New York. That theory also faces the additional obstacle that Petitioner filed its individual California suit before the New York class action had even been certified. Thus, even if this Court were inclined to fashion a special rule deeming post-opt-out individual actions "brought" by the class plaintiffs (presumably in a case where the Court granted certiorari on that question), Petitioner—which filed its individual action after the statute of repose had run, but before certification—could not benefit from such a rule.

III. Petitioner's policy arguments are addressed to the wrong forum, but are unavailing in all events. Far from dealing "a grave blow" to the class-action system, Pet.Br.22, affirming the decision below would simply give effect to Congress' clear intent to foreclose new actions against underwriters and other potential securities defendants three years after the securities offering. *IndyMac* has been the law in the

Second Circuit (the home of the bulk of the Nation's securities litigation) for nearly four years, yet the explosion of "protective" filings Petitioner fears has not materialized. Nor would the incentives to file opt-out suits or protective filings disappear if the Court adopted Petitioner's proposed rule, as Petitioner and the institutional investors concede. The possibility of individual filings is an unavoidable byproduct of class litigation, not a consideration that should skew this Court's interpretation of a straightforward statute of repose.

Petitioner is likewise incorrect that its proposed rule is needed to further the purposes of Rule 23 and *American Pipe*. Under Petitioner's preferred regime, sophisticated and well-resourced institutional investors will have every incentive to treat class actions as little more than tools to leverage for their own individual benefit, as demonstrated by the facts of this case. If a statute of repose can be tolled indefinitely, then large institutional investors can free-ride off a class action for years, wait for the case to settle, and rather than stay in the class and fight for the optimal recovery for the entire class, can opt out at the last minute using the class settlement as a baseline to seek an even greater recovery through an individual suit. The inevitable losers of that regime would be the small investors Congress sought to protect through Rule 23 and the Private Securities Litigation Reform Act of 1995 ("PSLRA").

Finally, tolling of the three-year statute of repose is not remotely required by due process. The Due Process Clause protects individuals from being bound by a judgment in an action brought by strangers, and

the opt-out right fully protects that right. But nothing in the Due Process Clause or anything else guarantees class members that they will have a viable claim to opt into. Moreover, in those cases where a post-opt-out individual action would be barred by a statute of repose, a class member dissatisfied with a class settlement is not powerless. They retain the right to object to the settlement and push for a better resolution for the entire class, as opposed to pushing for a separate resolution that benefits only one well-heeled institutional litigant.

ARGUMENT

I. Section 13's Three-Year Bar Is A Statute Of Repose That May Not Be Extended Under Any Circumstances.

A. Section 13's Three-Year "In No Event" Bar Is Unequivocally a Statute of Repose.

1. Statutes of limitations and statutes of repose both "promote justice by preventing surprises through [plaintiffs'] revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Waldburger*, 134 S. Ct. at 2183. "Both types of statute," moreover, "can operate to bar a plaintiff's suit, and in each instance time is the controlling factor." *Id.* at 2182. But beyond those surface similarities, statutes of repose and statutes of limitations seek "to attain different purposes and objectives." *Id.*

Statutes of limitations are directed at plaintiffs. The "main thrust" of a statute of limitations—which traditionally begins to run when the plaintiff suffers

the relevant injury or discovers the relevant violation—"is to encourage the plaintiff to 'pursu[e] his rights diligently.'" *Id.* at 2183 (quoting *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1231-32 (2014)). Statutes of limitations are thus "customarily subject to 'equitable tolling,'" *Irwin*, 498 U.S. at 95; *Lozano*, 134 S. Ct. at 1231-32, when equitable considerations excuse a plaintiff from not taking action sooner. Indeed, refusing to suspend a limitations period where equity demands flexibility would frustrate the central purpose of the provision. *See Waldburger*, 134 S. Ct. at 2182-83.

Statutes of repose, by contrast, are "targeted at a different actor"—the defendant—and "embod[y] the idea that at some point a defendant should be able to put past events behind him." *Id.* at 2183. Accordingly, a statute of repose establishes an absolute "outer limit on the right to bring a civil action"—*i.e.*, "'a cutoff'" of liability that may not be extended for any reason. *Id.* at 2182-83 (quoting *Lampf*, 501 U.S. at 363). Statutes of repose thus are "not related to the accrual of any cause of action," do not focus on the plaintiff's equitable circumstances, and generally run "from the date of the last culpable act or omission of the defendant." *Id.* at 2182.

2. Section 13's text, structure, and history make clear that whereas its one-year provision is a statute of *limitations* (which courts may extend under certain circumstances), its three-year deadline is unambiguously a statute of *repose* (which may not be extended under any circumstances).

Section 13 contains two separate time limits that Congress enacted in back-to-back sentences. First:

> No action shall be maintained to enforce any liability created under [Section 11] ... unless brought within one year after the discovery of the untrue statement or the omission, or after such discovery should have been made by the exercise of reasonable diligence....

15 U.S.C. §77m. And second:

> In no event shall any such action be brought to enforce a liability created under [Section 11] ... more than three years after the security was bona fide offered to the public....

Id.

These two provisions work together to limit the actions that may be brought under Section 11. A Section 11 claim must satisfy both sentences to be timely, but the two provisions are quite different in terms of their text, purpose, and effect. The one-year provision is a classic statute of limitations. It focuses on the plaintiff, begins to run upon the plaintiff's discovery of the violation, and requires the plaintiff to exercise diligence in bringing her claims. *See Waldburger*, 134 S. Ct. at 2182 ("[A] statute of limitations creates 'a time limit ... based on' ... 'when the injury occurred or was discovered.'" (quoting *Black's Law Dictionary* 1546 (9th ed. 2009))). And it uses "fairly simple language" that is not inconsistent with tolling, thereby confirming Congress' intention not to depart from the background default rule allowing equitable tolling. *See United States v. Brockamp*, 519 U.S. 347, 350 (1997) ("Ordinarily limitations statutes use fairly simple language,

which one can often plausibly read as containing an implied 'equitable tolling' exception.").

Section 13's three-year bar, by contrast, is a classic statute of repose. *See Lampf*, 501 U.S. at 363 (three-year provision is a "period of repose inconsistent with tolling"). Rather than run from the date the plaintiff discovers the violation, the three-year bar "is measured ... from the date of the last culpable act or omission of the defendant." *Waldburger*, 134 S. Ct. at 2182. Rather than provide an incentive for a *plaintiff* to "'pursu[e] his rights diligently,'" *id.* at 2182-83 (quoting *Lozano*, 134 S. Ct. at 1231-32), the three-year bar places a finite limit on a *defendant's* exposure under Section 11. *See id.* ("Statutes of repose effect a legislative judgment that a defendant should 'be free from liability after the legislatively determined period of time.'" (quoting 54 C.J.S. *Limitations of Actions* §7 (2010))). And, unlike the one-year limitation in the first sentence of Section 13, the three-year bar in the second sentence employs unmistakably categorical language: "*In no event*" may an action be brought after the three-year cutoff. 15 U.S.C. §77m (emphasis added); *see Brockamp*, 519 U.S. at 350 (time bar that "sets forth its time limitations in unusually emphatic form" is inconsistent with tolling).

Petitioner is thus flatly wrong to suggest that Section 13's three-year bar has "remarkably similar text[]" to the one-year provision. Pet.Br.45. "No action ... unless" and "[i]n no event" are about as similar as "in the following circumstances" and "never." The only thing remarkable is the emphatic nature of the "[i]n no event" language. The first

sentence incorporates a discovery rule and a reasonable-diligence requirement, whereas the second sentence states unequivocally that "[i]n no event" may an action be brought more than three years after the offering. The former is classic limitations language; the latter is classic repose language.

3. Petitioner further contends that since the one-year provision and the three-year provision "are merely two sentences in the same statutory paragraph," both are statutes of limitations subject to judicial extension. Pet.Br.43-45. But the proper inference from the statute's structure is exactly the opposite. The fact that Congress adopted a two-tiered structure and grouped the two time bars together underscores that the latter, longer limit is a statute of repose.

Congress specifically placed the three-year bar *on top of* a one-year limitations period that itself contains an express discovery rule. *See* 15 U.S.C. §77m. That two-tiered structure is a familiar one, and one Congress routinely uses to signal its intention to establish *both* a shorter, tollable limitations period *and* a longer, absolute outer limit to liability. *See, e.g.*, *Gabelli v. SEC*, 133 S. Ct. 1216, 1224 (2013) ("[S]tatutes applying a discovery rule ... often couple that rule with an absolute provision for repose."); *see also* Br. for United States as Amicus Curiae Supporting Neither Party at 26, 27 n.6, *Credit Suisse Sec. (USA) LLC v. Simmonds*, No. 10-1261 ("two-part structure" is "evidence of Congress's intent" to establish "outer limits [that] define[] absolute periods of repose").

Take, for instance, 28 U.S.C. §1658(b). Section 1658(b) provides that private suits alleging fraud in violation of the Exchange Act "may be brought not later than the earlier of— (1) 2 years after the discovery of the facts constituting the violation; or (2) 5 years after such violation." As this Court has explained, despite appearing in the same sentence as an express discovery rule (*i.e.*, Section 1658(b)(1)), Section 1658(b)(2) acts as an "*unqualified bar* on actions instituted '5 years after such violation,' giving defendants *total repose* after five years." *Merck & Co. v. Reynolds*, 559 U.S. 633, 650 (2010) (emphasis added) (citation omitted).

Moreover, since Section 13's one-year statute of limitations may be extended where equity demands, *see supra* pp.19-21, the three-year provision "can have no significance ... other than to impose an outside limit" on actions asserting Section 11 claims. *Lampf*, 501 U.S. at 363. Allowing Section 13's three-year bar to be extended, "even in cases of extraordinary circumstances," *Waldburger*, 134 S. Ct. at 2183, would thus render the provision largely superfluous. Congress did not include a second sentence in Section 13 for it to do no work.

Petitioner's reliance on Section 13's caption, "Limitation on actions," *see* Pet.Br.44-45, also misses the mark. This Court has frequently warned against placing undue weight on statutory captions and titles, and has underscored that the focus belongs on the operative language. *See, e.g., Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 211-12 (1998). That is particularly true here for two reasons. First, Petitioner itself points out that Congress has not

always been precise in labeling statutes of repose and limitations. Pet.Br.44; *accord Waldburger*, 134 S. Ct. at 2185 (citing 15 U.S.C. §78u-6(h)(1)(B)(iii)(I)(aa); 42 U.S.C. §2278).

Moreover, Section 13's caption does not say "statute of limitation," but rather refers to "[l]imitation[s] on actions," and there is no question that a statute of repose is an important limitation on actions. Thus, the caption is accurate if not particularly revealing. In all events, what matters, as this Court has underscored, is not the label Congress attaches to the provision in question, but what the provision actually says and does. *See Waldburger*, 134 S. Ct. at 2182-83, 2185-86. And on that score, Section 13's three-year bar is as clear as it gets: "In no event shall any ... action" under Section 11 be "brought ... more than three years after" the offering. 15 U.S.C. §77m. If that is not an "'absolute ... bar' on a defendant's temporal liability," *Waldburger*, 134 S. Ct. at 2183, then nothing is.[2]

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[2] In a halfhearted attempt to suggest that statutes of repose are just statutes of limitations by another name, Petitioner notes that "this Court has used the terms interchangeably." Pet.Br.45 n.8. But the only example Petitioner cites provides no support for Petitioner's position. Petitioner is correct that, in *Wallace v. Kato*, 549 U.S. 384, 391 (2007), the phrase "statute of limitations" appears "in the very next sentence" as the phrase "statute of repose." Pet.Br.45 n.8. But Petitioner omits the fact that, in *Wallace*, the Court referred to the hypothetical, subject-to-tolling provision as a "*supposed* statute of repose." 549 U.S. at 391 (emphasis added). The obvious import of that modifier was to signal that a *true* statute of repose would not be subject to tolling at all. *See Waldburger*, 134 S. Ct. at 2182-83, 2187.

4. Section 13's legislative history reinforces what its text and structure already make clear: Congress intended Section 13's three-year bar to be a "final limitation" after which an action alleging Section 11 claims "may not be brought at all." 78 Cong. Rec. 8198, 8200 (1934).

As originally enacted, the Securities Act employed a two-tiered structure with a two-year discovery period and a ten-year outer limit. In debating changes to the statute just one year after it was enacted, some representatives favored scrapping the two-tiered structure in favor of a single, five-year discovery rule. But Congress expressly rejected those proposals, and instead resolved to retain the two-tiered framework in order to "be just and fair to both sides." *Id.* at 8200. An absolute outer limit, in other words, was necessary to effectuate Congress' careful balancing of the interests of both plaintiffs (via Section 13's first sentence) and defendants (via the second sentence).

Congress also recognized that the original Act's long, ten-year period of exposure could "deter" qualified candidates from "serving on boards of directors," "disrupt normal business," and "facilitate false claims." *Norris v. Wirtz*, 818 F.2d 1329, 1332 (7th Cir. 1987), *overruled on other grounds by Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385 (7th Cir. 1990). Thus, to "give greater assurance to the honest officials of a corporation" and reduce the risk "that a director would be uncertain as to the settlement of his estate," Congress concluded that "a suit must be brought within 3 years," or it could not be brought at all. 78 Cong. Rec. 10,186 (1934).

Nothing in the record of Congress' deliberations in either 1933 or 1934 suggests in any way that Congress intended the newly shortened three-year limit to be subject to judicial extension. *See* James W. Beasley, Jr., Comm. on Fed. Regulation of Sec., *Report of the Task Force on Statute of Limitations for Implied Actions*, 41 Bus. Law. 645, 655 (1986) ("Congress did not intend equitable tolling to apply" to the three-year bar). Not a single "participant[] in the debate" over the 1934 amendments argued in favor of subjecting the repose period to tolling. Harold S. Bloomenthal, *Statutes of Limitations & The Securities Acts—Part I*, 7 Sec. & Fed. Corp. L. Rep. 17, 21 (1985). Rather, all agreed that Section 13's outer limit "was an absolute period." *Id.*

B. Statutes of Repose Are Not Subject to Equitable Tolling.

This Court has held in no uncertain terms that statutes of repose are not subject to judicial extension via estoppel or tolling. "Statutes of limitations, *but not statutes of repose*, are subject to equitable tolling." *Waldburger*, 134 S. Ct. at 2183 (emphasis added). Unlike a statute of limitations, which is "customarily subject to 'equitable tolling,'" *Irwin*, 498 U.S. at 95, "a repose period is fixed[,] and its expiration *will not be delayed by estoppel or tolling*." *Waldburger*, 134 S. Ct at 2187 (emphasis added). Statutes of repose remain absolute "even in cases of extraordinary circumstances." *Id.* at 2183. Indeed, even Petitioner concedes that statutes of repose are "not subject to equitable tolling." Pet.Br.8, 40.

It could hardly be otherwise. If courts suspended repose periods (even if only in truly sympathetic or

extraordinary cases), statutes of repose would fail to "reflect legislative decisions that as a matter of policy there should be a specific time beyond which a defendant should no longer be subjected to protracted liability." *Waldburger*, 134 S. Ct. at 2183. Worse still, if courts declined to respect Congress' decision to enact an absolute bar rather than an extendable limitations period—*i.e.*, if the kind of "[i]n no event" language employed by Congress here is not sufficient to mark a time period as a statute of repose immune from judicial extension—then it is hard to see how Congress would be able to maintain its undoubted authority to decide to grant defendants a substantive right to repose at all.

C. *American Pipe* Established an Equitable Tolling Rule That Does Not Apply to Section 13's Three-Year Statute of Repose.

1. In *American Pipe*, nonparty class members in an antitrust suit sought to intervene as individual plaintiffs after the district court denied class certification on numerosity grounds. 414 U.S. at 543-44. By the time the nonparty class members filed their motions to intervene, however, the relevant statute of limitations, Section 4B of the Clayton Act, had run. *Id.* at 544. The "question presented" in the case was thus "a limited one": Whether the filing of a putative class action "toll[ed] the running" of Section 4B's four-year limitations period as to "all purported members of the [putative] class who ma[d]e timely motions to intervene after the court has found the suit inappropriate for class action status." *Id.* at 540, 553. The Court answered that question in the

affirmative, but only after assuring itself that judicial extension of the legislative time limit was "consonant with the legislative scheme" at issue. *Id.* at 554-55, 558; *see also Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 350 (1983) (extending holding of *American Pipe* to "'all asserted members of the class,' ... not just to intervenors"). Thus, nothing in *American Pipe* (or any other decision of this Court) suggests that this equitable tolling rule would apply to a statute of repose such as the absolute three-year deadline in Section 13, which "will not be tolled for any reason." *Waldburger*, 134 S. Ct. at 2183.

At the outset, there is no question that *American Pipe* established a rule of tolling. Indeed, the Court explicitly described its holding as "the *tolling rule* we establish here." *American Pipe*, 414 U.S. at 555 (emphasis added); *see also Crown, Cork*, 462 U.S. at 352 (describing *American Pipe* as a "tolling rule"); *id.* at 354 (Powell, J., concurring) (same).

Nor is there any serious question that *American Pipe* applied a rule of *equitable* tolling. "[I]n fashioning the [*American Pipe*] rule," the Court "took into account traditional equitable considerations." *Albano v. Shea Homes Ltd. P'ship*, 634 F.3d 524, 537 (9th Cir. 2011). For instance, the Court relied on the fact that class certification had been denied for lack of numerosity, not "for reasons of bad faith or frivolity." *American Pipe*, 414 U.S. at 553. And in noting that its decision broke no "new ground," *id.* at 558, the Court cited "cases where the plaintiff ha[d] refrained from commencing suit during the period of limitation because of inducement by the defendant ... or because of fraudulent concealment," *id.* at 559

(citing *Glus v. Brooklyn E. Terminal*, 359 U.S. 231 (1959); *Holmberg v. Armbrecht*, 327 U.S. 392 (1946)). Those paradigmatically equitable considerations were central to the Court's holding.

Indeed, the "tolling rule" applied in *American Pipe* could not have been anything *other than* a rule of equitable tolling. To be sure, sometimes Congress mandates that courts pause limitations periods in certain enumerated circumstances. *See, e.g.*, 28 U.S.C. §2244(d)(2) ("The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection."); *see also Pace v. DiGuglielmo*, 544 U.S. 408, 417-18 (2005). But such "statutory tolling" was not at issue in *American Pipe*. *See* 414 U.S. at 541 nn.2-3. Where a statute lacks an express command to pause the running of a deadline, a court's only basis for extension is equitable tolling—and only then if it is consistent with the text and purpose of the statute, as *American Pipe* itself recognized. *See id.* at 558; *accord Lozano*, 134 S. Ct. at 1231-32.

It should therefore come as no surprise that this Court has routinely characterized *American Pipe* as applying a rule of equitable tolling. *See, e.g.*, *Young v. United States*, 535 U.S. 43, 49 (2002) (citing *American Pipe* as an example of the "hornbook" principle that limitations periods "are customarily subject to equitable tolling"); *Irwin*, 498 U.S. at 96 & n.3 (characterizing *American Pipe* as a case in which this Court has "allowed equitable tolling"); *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S.

322, 338 n* (1978) (Burger, C.J., concurring) (citing *American Pipe* as an example of "[t]he authority of a federal court ... to toll a statute of limitations on equitable grounds").

2. If this Court concludes, as it should, that Section 13's three-year bar is a statute of repose and that *American Pipe* applied an equitable tolling rule, then that is the end of the case.

This Court has already held that statutes of repose are not subject to equitable tolling. As discussed above, "a repose period is fixed[,] and its expiration will not be delayed by estoppel or tolling." *Waldburger*, 134 S. Ct. at 2187; *see id.* at 2183 ("[s]tatutes of limitations, but not statutes of repose, are subject to equitable tolling"). And that is particularly true in the context of Section 13, which includes the unusually unequivocal language that "[i]n no event" may a Section 11 action be brought more than three years after the securities offering. 15 U.S.C. §77m. Unsurprisingly, in the three years since this Court decided *Waldburger*, which reaffirmed that one of the distinguishing features between statutes of limitations and statutes of repose is that the latter are not subject to equitable tolling, every federal circuit court to consider the issue has concluded that *American Pipe* does not apply to statutes of repose such as Section 13.[3]

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[3] *See, e.g.*, Pet.App.1a-6a; *Dusek v. JPMorgan Chase & Co.*, 832 F.3d 1243, 1247-49 (11th Cir. 2016), *petition for cert. filed*, No. 16-389 (Sept. 26, 2016); *SRM Glob. Master Fund Ltd. P'ship v. Bear Stearns Cos. LLC*, 829 F.3d 173, 176-77 (2d Cir. 2016), *petition for cert. filed*, No. 16-372 (Sept. 22, 2016); *Stein v. Regions Morgan Keegan Select High Income Fund, Inc.*, 821

D. Petitioner's Argument That *American Pipe* Established a "Legal" Tolling Rule Fails.

1. Conceding that statutes of repose are "not subject to equitable tolling," Pet.Br.8, 40, Petitioner argues that *American Pipe*'s "tolling rule" is "either *sui generis*, or it is a form of legal tolling because it sets forth an 'interpretation' of Rule 23." Pet.Br.47. Petitioner does not further explicate what it means by a "*sui generis*" tolling rule, nor does it explain how courts would have authority to create "*sui generis*" exceptions to statutory deadlines. Certainly, that label is no substitute for a coherent theory of how a judge-made tolling rule could trump a congressional statute of repose, when this Court has already made clear that a defining feature of statutes of repose is that, unlike statutes of limitation, they are not subject to tolling or estoppel. *See Credit Suisse Sec. (USA) LLC v. Simmonds*, 566 U.S. 221, 226 n.6 (2012) ("[t]he label attached to [a tolling] rule does not matter").

Petitioner's contention that *American Pipe* reflects a "legal" tolling rule is nearly as opaque and question-begging, and is in all events unavailing. Presumably the "legal" tolling label reflects the notion that the rule flows from some source of law other than the courts' general equitable powers.[4] But

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F.3d 780, 793-94 (6th Cir. 2016); *DeKalb Cty. Pension Fund v. Transocean Ltd.*, 817 F.3d 393, 413-14 (2d Cir. 2016), *petition for cert. filed*, No. 16-206 (Aug. 12, 2016).

[4] Although some lower courts have described *American Pipe* as applying "legal tolling," this Court has expressly declined to join them in that characterization—and indeed, has never

there are only two candidates for the source of this legal rule and both have fatal problems. The rule cannot flow from Section 13 itself because, far from authorizing any tolling, that provision positively forecloses tolling with its "[i]n no event" language.

Petitioner thus must think this "legal" rule emanates from Rule 23, but that argument faces multiple insurmountable hurdles. First, Rule 23 says nothing about tolling. Rule 23 sets forth an intricate lattice of rules governing multiple aspects of class action practice, but says nary a word about tolling—let alone about whether (or when) the pendency of a putative class action may affect a statutory time limit for commencing some *other* individual action. *Cf. Walker v. Armco Steel Corp.*, 446 U.S. 740, 750-51 (1980) (rejecting argument that Rule 3 governed tolling of state limitations period because "[t]here is no indication that the Rule was intended to toll a state statute of limitations"). It would be implausible, to say the least, to suggest that *American Pipe*'s tolling rule was premised on a procedural rule that says exactly nothing about tolling or time limits.

Second, this Court has already rejected the argument that *American Pipe* is an emanation from Rule 23 that displaces contrary law. *See Chardon v. Fumero Soto*, 462 U.S. 650, 659-61 (1983). While the dissent in *Chardon* embraced that view, *see id.* at 664 (Rehnquist, J., dissenting), the majority rejected it and confirmed that the tolling rule in *American Pipe*

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embraced a distinction between equitable tolling and "legal"-but-still-judge-made tolling. *See Credit Suisse*, 566 U.S. at 226 n.6.

flowed from the limitations provision there at issue. *See id.* at 659, 661 (majority opinion) (the "particular federal statute" at issue "provided the basis for" tolling in *American Pipe*).

Reconceptualizing *American Pipe* as an emanation from Rule 23 rather than an application of equitable tolling principles to a congressional time limit would also create serious anomalies for putative class actions filed in state court. As long as *American Pipe* is a product of the equitable powers of federal courts as applied to federal statutes of limitations (and not repose), it makes little difference whether the putative class action said to toll an otherwise untimely individual federal-court action proceeded in state court or federal court. Either way, it is federal law that is doing the tolling. But if *American Pipe* is reconceptualized as emanating from Rule 23, then it is hard to see how a putative class action filed in state court could toll a congressional statute, whether of repose or limitation. Whatever the problems with a federal rule of procedure overriding a federal substantive statute, *see infra*, the Supremacy Clause would not allow a state rule of procedure to trump any federal statute, whether procedural or substantive. And it is clear that Rule 23 does not apply of its own force in state court.

Thus, the only valid way to understand *American Pipe* is as an application of equitable principles to the particular federal time limit at issue. Because the time limit at issue in *American Pipe* was a statute of limitations, equitable tolling principles applied. Because the time limit at issue

here is a statute of repose, equitable tolling is inapplicable.

2. Construing *American Pipe* as a "legal" tolling principle based on Rule 23 that would trump Section 13's three-year statute of repose faces an equally fatal obstacle in the Rules Enabling Act.

This Court has made clear that statutes of repose give defendants substantive rights to repose. Whereas statutes of limitations govern a plaintiff's *procedural* ability to sue, statutes of repose confer *substantive* rights "to be free from liability after a legislatively determined period." *Barnett v. DynCorp Int'l, L.L.C.*, 831 F.3d 296, 307 (5th Cir. 2016); *see also Waldburger*, 134 S. Ct. at 2183 ("Like a discharge in bankruptcy, a statute of repose can be said to provide a fresh start or freedom from liability."); *IndyMac*, 721 F.3d at 106 ("[I]n contrast to statutes of limitations, statutes of repose 'create[] a *substantive* right in those protected to be free from liability after a legislatively-determined period of time.'"); *Goad v. Celotex Corp.*, 831 F.2d 508, 511 (4th Cir. 1987) ("Statutes of repose are meant to be 'a substantive definition of rights as distinguished from a procedural limitation on the remedy used to enforce rights.'").[5]

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[5] The United States has likewise recognized many times that a statute of repose is "a substantive definition of rights rather than a procedural limitation on the remedy used to enforce rights." Br. for United States as Amicus Curiae Supporting Petitioner at 27, *CTS Corp. v. Waldburger*, No. 13-339; *see also id.* at 14 (noting the "recognized line between statutes of limitations, which are considered procedural, and statutes of repose, which are substantive limits on liability"); Br. for United States in Opposition at 7-8, *Lyon v. Augusta S.P.A.*, No. 01-569

Under this Court's precedents and the Rules Enabling Act, however, courts may not "interpret[] Rule 23 to 'abridge, enlarge or modify any substantive right.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011) (quoting 28 U.S.C. §2072(b)); *see also Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1046 (2016) (judicial applications of Rule 23 must themselves conform to the limits of the Rules Enabling Act). Applying a tolling rule emanating from Rule 23 to allow a plaintiff to bring a suit that otherwise would have been barred by a statute of repose would unquestionably "abridge ... or modify" the defendant's *substantive* right to repose.

Unlike in *American Pipe*, the substantive/procedural divide of the Rules Enabling Act cannot be avoided by concluding that tolling "is consonant with the legislative scheme." 414 U.S. at 558. Here, the legislative scheme provides a statute of repose incompatible with tolling. *See supra* pp.19-23. Petitioner's contention that "'[w]hat matters is what the Rule itself regulates,'" Pet.Br.49 (quoting *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407 (2010) (plurality opinion)), is likewise beside the point. No one doubts that Rule 23 "really regulates procedure." *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941). But Rule 23 says nothing about limitations or repose periods. Thus, the relevant question is not what Rule 23 *itself* regulates, but rather what effect Petitioner's preferred interpretation of *American Pipe* and Rule 23 would

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(A "statute of repose, unlike [a] statute of limitations, creates [a] substantive right to be free from liability and therefore is not susceptible to tolling.").

have on defendants' substantive rights. The answer to that question is clear: It would impermissibly trump the defendant's substantive right to repose.

Thus, reconceptualizing *American Pipe* as a "legal" rule that trumps substantive rights to repose would reconceptualize it into a Rules Enabling Act violation. It would also create serious separation-of-powers concerns, as the Rules Enabling Act helps ensure that judicially promulgated rules do not interfere with Congress' exclusive authority to legislate. *See, e.g.*, *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, No. 15-927, Slip Op. 4 (U.S. 2017) (cautioning against "giv[ing] judges a 'legislation-overriding' role that is beyond the Judicary's power" (quoting *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1974 (2014))). It is one thing for courts to promulgate rules that reflect courts' authority to fashion rules of procedure to govern their own proceedings. It is quite another matter for courts to promulgate rules that would override congressionally-conferred substantive rights of repose.

3. Petitioner asserts that Respondents have no "'substantive right' to force plaintiffs to litigate their Section 11 claims through a class representative." Pet.Br.49. That is a red herring. No one forced Petitioner—a $300 billion investment fund and sophisticated litigant—to wait more than three years after the debt offerings at issue to file its individual suit. But once Petitioner chose to wait that long to file, it would inevitably confront Respondents' substantive right to repose. And relying on a timely-filed putative class action and Rule 23 to override

that substantive right squarely implicates the Rules Enabling Act.

Petitioner further contends that because Section 13 "says nothing about creating or extinguishing substantive rights," the Rules Enabling Act poses no bar to tolling the three-year repose period. Pet.Br.50. But this Court has made clear that statutes of repose confer substantive rights on defendants to be free from suit. *See supra* p.34. Thus, a statutory time limit that made clear not only that it was a statute of repose but also that it created a substantive right to repose would be redundant. This Court does not demand redundancy or any magic words. Instead, what matters is whether Section 13 is a statute of repose, *i.e.*, "whether Congress intended that 'the right shall be enforceable in any event after the prescribed time.'" *Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 416 (1998). Section 13's answer to that question could not be clearer: "*In no event*" may an action under Section 11 be brought more than three years after the securities offering. 15 U.S.C. §77m (emphasis added).

Finally, Petitioner is wrong to suggest (at 50-51) that this Court rejected a similar Rules Enabling Act argument in *American Pipe*. The statutory time limit at issue in *American Pipe* in no way "parallels" Section 13's statute of repose. *Contra* Pet.Br.51. As the Court noted, Section 4B of the Clayton Act "'is strictly a procedural limitation and has nothing to do with substance.'" *American Pipe*, 414 U.S. at 558 n.29 (quoting 101 Cong. Rec. 5131 (1955)). Indeed, the Congress that enacted Section 4B specifically

intended that the provision "'in no way affect the substantive rights of individual litigants.'" *Id.*

Moreover, there was never any doubt that the statutory time limit at issue in *American Pipe* could be tolled under certain circumstances, which is antithetical to a statute of repose. *See Waldburger*, 134 S. Ct. at 2183, 2187. The Clayton Act *itself* expressly provided for tolling in the event of a government antitrust action—and, indeed, the limitations period in that case had already been tolled twice under that provision. *See American Pipe*, 414 U.S. at 560-61. Section 4B thus did not create the kind of "fixed" substantive period of repose not subject to "'delay[] by estoppel or tolling,'" *Waldburger*, 134 S. Ct. at 2187, provided by Section 13. Thus, there was no Rules Enabling Act problem there. But since Section 13 is a statute of repose, tolling—whether labeled equitable, legal, or *sui generis*—is not permitted by, *inter alia*, the Rules Enabling Act.

II. Petitioner's Argument That Its Individual Action Is Timely "Regardless Of Tolling" Is Outside The Scope Of The Question Presented And Wrong On The Merits.

In implicit recognition that no amount of relabeling or reconceptualization will allow a "tolling rule" to override a statute of repose, Petitioner offers the alternative theory that this Court can reverse the judgment below "regardless of tolling." Pet.Br.11-12, 30-38. According to Petitioner, "wholly apart from the question of tolling," the filing of a timely class action complaint "commences" the action for *all* members of the putative class, even those who later

seek to bring separate individual actions. Pet.Br.31. Petitioner thus contends that "the filing of the Class Action Complaint timely 'brought' the claims of every class member, including CalPERS." Pet.Br.31-32. That alternative theory is outside the bounds of what this Court agreed to consider in granting certiorari and deeply flawed.

A. The Court Expressly Declined To Grant Certiorari on This Issue.

Petitioner seems not to understand the meaning of "limited to Question 1." The petition for certiorari presented two distinct questions: (1) "Does the filing of a putative class action serve, under the *American Pipe* rule, to satisfy" Section 13's three-year statute of repose with respect to putative class members' individual claims; and (2) whether, even if not, a member of a timely filed putative class action may bring an individual action asserting the same claims. Pet.i. In support of the second question presented (hereinafter "QP2"), Petitioner argued that its individual suit filed in California was not a "new action" under Section 13, but rather merely involved Petitioner "taking over the prosecution" of an existing claim from the putative class representative. Pet.27. Because Petitioner's claims were supposedly "presented by a class representative within Section 13's time limits," Petitioner asserted that its separate suit was "timely even without tolling." Pet.28.

This Court granted certiorari, but *expressly limited its grant* "to Question 1 presented by the petition." Order List (Jan. 13, 2017). That was no accident, as the Court was considering multiple petitions, some raising one issue and others raising

two. Nonetheless, Section II of Petitioner's merits brief, *see* Pet.Br.11-12, 30-38, now raises the precise argument on which this Court declined to grant certiorari. For example, quoting the same unpublished district court decision cited in the QP2-portion of the petition, Petitioner argues that "'when an unnamed, putative class member later files its own individual claim, it is not instituting a new action subject to the statute of limitations and statute of repose; it is simply taking over the prosecution of its individual claim from the putative class representative.'" Pet.Br.30 (quoting *In re BP p.l.c. Sec. Litig.*, No. 4:13-cv-1393, 2014 WL 4923749 (S.D. Tex. Sept. 30, 2014)); *compare* Pet.27 (same). And just as it argued in the petition in support of the non-granted QP2, Petitioner contends here that "the timely filing of the Class Action timely 'brought' CalPERS's claims." Pet.Br.32; *compare* Pet.28 ("petitioner's claims were presented by a class representative within Section 13's time limits").

Amazingly, Petitioner not only raises the non-granted QP2 as a standalone argument and promotes it as the "easiest path to reversal," Pet.Br.11, but also resurfaces the QP2 argument in other parts of its brief. For instance, Petitioner argues that a statute of repose should not foreclose tolling where "the plaintiff's claim *was already timely filed* before the expiration of the repose period" via a class action. Pet.Br.41; *see also* Pet.Br.40 (statute of repose "relates only to *new* assertions of liability"). And Petitioner attempts to distinguish *Lampf* on the ground that "in this case, the 'litigation'—*i.e.*, the Class Action—was 'commenced ... within three years' of the violation." Pet.Br.46. All of those arguments

are just variations on Petitioner's non-granted QP2 theory that its Section 11 claims were "brought" or "commenced" within three years of the offering because Petitioner was a member of a timely-filed putative class action bringing similar claims.

This Court should not reward such a brazen end-run around its explicit decision to limit the grant of certiorari. Petitioner's effort to disregard this Court's direction and to forge ahead and brief QP2 leaves Respondents little choice but to respond to extraneous arguments, and detracts attention and briefing space from the one question this Court decided to hear. This Court has had little patience for comparable tactics, *cf.* Order, *Visa, Inc. v. Osborn*, No. 15-961 (Nov. 17, 2016), and should expressly disregard the arguments raised at pp. 11-12, 29-38, 40-41, and 46 of Petitioner's brief.

B. Petitioner's Alternative Theory Fails on the Merits.

1. Even if the Court were to consider the merits of Petitioner's non-granted QP2 argument, it should make short work of it, as it relies on an implausible reading of Section 13. According to Petitioner, when it filed a new action in California more than three years after the relevant securities were offered to the public, its Section 11 claims were still timely because similar claims were filed in New York by different lawyers in a putative class action. This is so, we are told, because, wholly apart from any principle of tolling, the Section 11 "claims" were "*already timely filed*" the moment the putative class action was filed. Pet.Br.41. But Section 13 does not speak of "claims"; it speaks of "action[s]":

> No *action* shall be maintained to enforce any liability created under [Section 11] unless brought within one year after the discovery of the untrue statement or the omission.... In no event shall any such *action* be brought ... more than three years after the security was bona fide offered to the public....

15 U.S.C. §77m (emphasis added).

An "action" is "[a] civil or criminal judicial proceeding." *Black's Law Dictionary* 12 (3d pocket ed. 2006); *compare id.* at 105 (defining "claim" to mean, *inter alia*, "[t]he part of a complaint in a civil *action* specifying what relief the plaintiff asks of the court" (emphasis added)). Regardless of whether Petitioner's *claims* mirror those asserted in the Class Action, Petitioner cannot seriously dispute that its separate individual *action—i.e.*, the action whose timeliness is at issue in this Court—was filed more than three years after the offerings at issue.[6] And the class action in New York and the individual action in California are self-evidently different actions. Indeed, no reasonable user of the English language would say that an individual suit filed in California was the same "action" as a putative class action being litigated by different plaintiffs in New York.

According to Petitioner, the Court need not be concerned about interpreting "action" to mean "claim" because "in this context, the word 'action'

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[6] As Rule 3 makes clear, "[a] civil action is commenced by filing a complaint with the court," not by presenting claims brought by different plaintiffs in a different forum.

means a 'cause of action,' which refers to a claim for relief, and not the complaint as a document." Pet.Br.35. But it is no less verboten for a court to add words to a statute (expanding "action" to "cause of action") than it is to change them (morphing "action" into "claim"). "Action" in Section 13 means neither claim nor cause of action, but action.

Even setting aside that considerable problem, Petitioner's argument still fails. A simple perusal of the Securities Act reveals that Congress knew the difference between "claims" (or "causes of action") on the one hand and "actions" on the other. The Securities Act uses the term "claim" dozens of times, including more than twenty times in 15 U.S.C. §77kkk alone. Some sections of the Act use the terms "action" and "claim" *in the same subparagraph*.[7] And Section 13 itself uses a synonym for claim—"a liability created under [Section 11]"—in contradistinction to an "action." Section 13 could just as easily refer to an action raising a claim under Section 11. Petitioner thus cannot plausibly contend that the word "action" in Section 13 is synonymous with "claim."

Petitioner asserts (at 35-36) that the "most instructive case" on its QP2 argument is *Jones v. Bock*, 549 U.S. 199 (2007), which addressed the administrative-exhaustion requirement under the

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[7] *See, e.g.*, 15 U.S.C. §77z-1(a)(3)(A)(ii) ("If more than one action on behalf of a class asserting substantially the same claim or claims arising under this subchapter is filed, only the plaintiff or plaintiffs in the first filed action shall be required to cause notice to be published in accordance with clause (i)."); *id.* §77z-1(a)(3)(A)(i)(I).

Prison Litigation Reform Act ("PLRA"). But *Jones* stands only for the unremarkable proposition that when a single action includes some exhausted claims and some unexhausted claims, the court should dismiss the latter and allow the former to proceed. In short, "if a complaint contains both good and bad claims, the court proceeds with the good and leaves the bad." *Id.* at 221.

Nothing in the decision below is inconsistent with *Jones*. Indeed, as noted above, Petitioner was *allowed* to proceed with its "good"/timely claims; those claims have since been settled. *See supra* pp.8-9; Pet.Br.6 n.2. But nothing in *Jones* suggests that a Section 11 plaintiff may be excused from complying with Section 13's three-year statute of repose merely because it brought other timely claims. That would be akin to the petitioners in *Jones* arguing that they could be excused from the PLRA's exhaustion requirement for the non-exhausted claims because of the presence of an exhausted claim—an argument that plainly would have been a non-starter.

2. Petitioner's alternative QP2 argument suffers the additional defect that Petitioner was never even a party to the timely New York action. At the time Petitioner filed its individual action in California, no class had been certified in the New York action. *See supra* pp.8-9. As this Court recently explained, the notion "that a nonnamed class member is a party to the class-action litigation before the class is certified" is "surely erroneous." *Smith v. Bayer Corp.*, 564 U.S. 299, 313 (2011); *accord Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1349 (2013); *see also Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct.

1523, 1530 (2013) (class action does not "acquire[] an independent legal status" until it is certified).

Petitioner's non-granted QP2 theory can be rejected for this reason alone: Unless and until a class certification order is issued, non-named class members are not parties to the class action *at all* and cannot be deemed to have "brought" or "commenced" any claims for purposes of determining whether a later-filed individual action is timely. At the point that Petitioner filed its California individual action, it was a stranger to the New York action. The fact that the New York action involved a putative class action that would include Petitioner if certified might be enough to trigger *American Pipe* tolling (where that doctrine applies), but it is not remotely enough to deem Petitioner's Section 11 claims as having been actually "brought" in that separate action.

3. Finally, Petitioner contends that allowing an individual action to be brought after the statute of repose has expired will not make a dime's worth of difference for defendants because "the number and identity of claims" does not change when a plaintiff "t[akes] over its individual piece of the litigation by filing its own complaint and opting out of the Class Action." Pet.Br.34; *see also* Pet.Br.40 (individual action is not a "*new* assertion[] of liability"). That argument simply disregards the reality of how class actions are litigated.

The entire purpose of a separate individual action is to allow the opt-out plaintiff to pursue a *different* strategy from the class, which almost always involves seeking *more money* than the plaintiff believes it would receive by staying in the

class. Indeed, as noted above, Petitioner routinely boasts that its opt-out suits have yielded much greater recoveries than it would have obtained had it remained in the underlying class actions. *See supra* pp.8-9. It blinks reality to suggest that a class action *plus* an individual suit by a putative class member (especially one as sophisticated and deep-pocketed as Petitioner) is no different in practical effect from the class action standing alone. More broadly, repose allows a defendant to know not just the amount of potential monetary exposure, but how many suits it will face and in how many fora. Exposing a defendant to the possibility of multiple individual suits in multiple fora is hardly repose.

In sum, despite Petitioner's suggestions to the contrary, allowing separate actions to be brought after the statute of repose has expired would result in the precise uncertainty and expanded liability that statutes of repose are designed to prevent. *See Waldburger*, 134 S. Ct. at 2183 ("Like a discharge in bankruptcy, a statute of repose can be said to provide a fresh start or freedom from liability.").

III. Petitioner's Policy Arguments Do Not Support Disregarding The Three-Year Statute Of Repose.

Perhaps sensing the clarity with which Section 13 sets forth a non-tollable statute of repose, Petitioner opens its brief with a paean to policy concerns. *See* Pet.Br.15-25 (arguing that tolling is needed to protect "the interests this Court sought to protect in *American Pipe*"). Even if meritorious, such concerns could not trump Section 13's plain text, structure, and history, or overcome Congress' policy

choice to provide true repose "even in cases of extraordinary circumstances." *Waldburger*, 134 S. Ct. at 2182-83. But Petitioner's policy arguments are wide of the mark in all events.

A. Petitioner's Parade of Horribles Is Illusory.

According to Petitioner, affirming the decision below would "deal[] a grave blow" to the federal judiciary and class-action litigants, "produc[ing] a logistical and risk management nightmare for courts and defendants." Pet.Br.22. In particular, Petitioner warns of a flood of "protective" filings to preserve the timeliness of any potential individual claims. That sky-will-fall prediction might have had some credence back when this Court first considered *IndyMac*. But *IndyMac* has now been the law of the Second Circuit (where the bulk of securities class actions are filed) since 2013, yet the sky has not fallen and the predicted flood is but a trickle.

As of November 2016, only *three* out of 189 securities class actions (1.59%) filed in the Second Circuit since *IndyMac* had generated *any* opt-out litigation. *See* Filings Database, Securities Class Action Clearinghouse, Stanford Law School, http://stanford.io/1CscqnJ. That rate is *lower* than in the years preceding the *IndyMac* decision. *See* Amir Rozen et al., Cornerstone Research, *Opt-Out Cases in Securities Class Action Settlements* 2 (2013) ("*Opt-Outs*") (between 1996 and 2011, approximately 3% of securities class-action settlements produced opt-out litigation). Moreover, a recent update to a study of opt-out cases from securities class actions, which includes actions filed after *IndyMac*, "found no

discernible increase in the preponderance of opt-outs over time." Amir Rozen et al., Cornerstone Research, *Opt-Out Cases in Securities Class Action Settlements, 2012–2014 Update* 2 (2016).

All Petitioner can muster to support its contrary prognostication is a single case, *In re Petrobras Securities Litigation*, 312 F.R.D. 354 (S.D.N.Y. 2016). *See* Pet.Br.23-24. *Petrobras*, however, only underscores that opt-out litigation typically has little or nothing to do with *American Pipe* or *IndyMac*. The defendant, Brazil's state-run energy company Petróleo Brasileiro S.A., or "Petrobras," was at the relevant time one of the largest companies in the world—larger than Boeing, Microsoft, or Procter & Gamble. While *Petrobras* has generated a significant number of opt-outs, those appear to be driven by the perceived value of the opt-out claims rather than a desire to preserve the timeliness of those claims.

By and large, the parties that have opted out of the *Petrobras* class are sophisticated institutional investors that believe they can achieve a greater recovery by going it alone. That is nothing new, and hardly a phenomenon limited to securities class actions or class actions involving claims subject to a statute of repose. *See Opt-Outs* at 1 ("The most frequently observed opt-out plaintiffs are pension funds, followed by other types of asset management companies."). Wholly apart from any concern about tolling, parties with the most skin in the game often conclude that they can do better through an individual action brought by their own counsel than by riding along as passive members of the class. *See In re Petrobras Sec. Litig.*, 312 F.R.D. at 362 ("[I]t is

not uncommon for large institutions to opt out of class actions simply so that they can improve their bargaining position if, as usually occurs, settlement discussions begin.").

Indeed, Petitioner—which oversees nearly $300 billion in assets—is a prime example of this type of player. Well before *IndyMac*, Petitioner opted out of the AOL/Time Warner securities litigation based on its conclusion that, by going it alone, it could recover approximately *seventeen times* what it would have recovered as part of the class. *See* Press Release, *CalPERS Recovers $117.7 Million in Time Warner Lawsuit* (Mar. 14, 2007), http://bit.ly/2ovCJXe. It would thus be deeply misleading to suggest that the opt-outs in *Petrobras* are attributable to *American Pipe* or *IndyMac* rather than to the normal litigation incentives facing large institutional investors.

Moreover, while large institutional litigants have incentives to opt out of certain cases with or without the *IndyMac* rule, there is little risk that the vast bulk of class members will file protective individual suits. Indeed, a major justification for class action litigation is that it provides relief to class members that have no incentive to litigate on their own. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997); *American Pipe*, 414 U.S. at 551-52.[8]

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[8] To the extent that the rule of *IndyMac* might change the timing, but not the volume, of opt-out suits, that phenomenon could potentially be helpful. If those individual suits are simply put on hold until the class action settles, then their earlier filing will make little difference. But incentivizing early opt-out decisions will benefit class members and defendants alike, as both sides will be able to litigate (and, perhaps, negotiate) with

In all events, Petitioner's proposed rule would hardly eliminate the incentive for sophisticated litigants to file protective individual actions, as Petitioner and the institutional investors concede. *See* Pet.Br.23; Institutional Investors Br. 20. Whenever there are questions about whether a group of potential litigants comes within the class definition or whether their claims overlap with those raised by the class representatives, there will be incentives for sophisticated litigants to file protective individual actions to avoid being denied the benefits of *American Pipe* tolling. *See, e.g., In re Countrywide Fin. Corp. Mortg.-Backed Sec. Litig.*, 860 F. Supp. 2d 1062, 1067-70 (C.D. Cal. 2012) (holding that *American Pipe* tolling does not apply to investors who purchased different tranches of securities than named class plaintiffs). The possibility of some duplicative, protective individual filings is an unavoidable byproduct of class litigation more generally rather than some unique flaw of the *IndyMac* rule.

In sum, despite Petitioner's foreboding prophecies about a flood of litigation, there is zero empirical evidence suggesting that protective opt-out filings have increased in the wake of *IndyMac*. And large sophisticated investors such as Petitioner will continue to have incentives to file opt-out suits for reasons that have nothing to do with tolling or

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greater certainty as to where the parties stand. Moreover, if some of the individual suits yield early individual settlements that give a benchmark to judge the fairness of the class settlement, the individual suits will aid the district court's difficult task under Rule 23(e) and potentially benefit the class.

statutes of repose. Petitioner's policy concerns provide no basis to depart from the clear text of Section 13.[9]

B. Petitioner's Preferred Rule Would Undermine, Not Further, the Purposes of Rule 23 and the PSLRA.

Petitioner, one of the largest investment funds in the world, also asserts that applying Section 13 to individual opt-out actions will "disproportionately harm smaller investors who lack the awareness or wherewithal to file protective individual complaints—*i.e.*, the investors who most need the protection offered by the federal securities laws." Pet.Br.25. To the contrary, while Petitioner's proposed rule might provide some marginal benefits to large institutional investors that want to keep their options open, it would have negative effects for both smaller investors and the class-action system more generally.

One of the central purposes of Rule 23 is to provide parties that individually may have relatively small potential recoveries (and thus relatively little incentive to file suit) a meaningful opportunity to

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[9] One group of amici offers an "empirical" analysis that purportedly shows the "efficiency toll" of the *IndyMac* rule. *See* Br. for Civil Procedure and Securities Law Professors. That brief includes an elaborate analysis of how long it takes to certify classes. *Id.* at 5-15. But, like Petitioner, those amici point to zero evidence suggesting that protective opt-out filings have *actually increased* in the Second Circuit or any of the other circuits that have adopted the *IndyMac* rule. At most, those amici quibble with the research showing that opt-out suits have *not* increased in the wake of *IndyMac*.

obtain redress for their injuries. *See Amchem*, 521 U.S. at 617; *American Pipe*, 414 U.S. at 551-52. A further aim of Rule 23 is to bring larger, more sophisticated parties together with smaller ones on the theory that a rising tide will lift all boats. Rule 23 "both permits and encourages class members to rely on the named plaintiffs to press their claims," *Crown, Cork*, 462 U.S. at 352-53, and smaller investors will inevitably do better if they can rely on the resources and know-how of larger co-plaintiffs with overlapping interests.

Indeed, Congress recognized that this phenomenon is particularly prevalent in securities litigation, and enacted the PSLRA in part to increase the likelihood that large institutional investors (such as Petitioner) would serve as lead plaintiffs in securities class actions. *See, e.g.*, S. Rep. No. 104-98, 11 (1995); H.R. Conf. Rep. No. 104-369, 34 (1995). Congress thus established a rebuttable presumption that the plaintiff with "the largest financial interest" in the suit is the "most adequate" representative of a securities class. 15 U.S.C. §§77z-1(a)(3)(B)(iii), 78u-4(a)(3)(B)(iii). Experience has borne out Congress' prediction: The involvement of sophisticated institutional investors in securities class actions "correlate[s] with a significantly greater outcome for the class." Stephen J. Choi et al., *The Impact of the Lead Plaintiff Provision of the Private Securities Litigation Reform Act*, 83 Wash. U. L.Q. 869, 892 (2005).

Under Petitioner's preferred regime, however, large, sophisticated, and well-resourced institutional investors would have greater incentives *not* to seek

the helm of securities class actions. Instead, those sophisticated parties could simply sit on their hands and free-ride for years while others litigate the class action. Then, once a class settlement is reached, they could use the class settlement as a baseline, opt out of the class, and launch individual suits to seek a greater recovery for themselves. Petitioner is no stranger to such a strategy, as it routinely boasts that its separate opt-out actions have yielded more money that it would have obtained through the class settlements. *See supra* pp.8-9, 49.

Allowing indefinite tolling of statutes of repose would merely increase the time in which large institutional investors can free-ride off a class action before they opt out to seek a greater recovery on their own.[10] None of this has anything to do with protecting "smaller investors," Pet.Br.25, or advancing the purposes of Rule 23, and it is directly contrary to the PSLRA's explicit goal of encouraging large institutional investors to remain within the class-action regime for the benefit of all class members. Simply put, all investors, especially smaller ones, are better off with large institutional investors inside the class fighting for a better result for all than with them outside the class seeking a better deal only for themselves.

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[10] The institutional investor amici candidly acknowledge this incentive to free-ride. *See* Institutional Investors Br. 11. By remaining "passive class member[s]," large institutional investors can obtain the benefits of the class action without subjecting themselves to the "costs and expenses" of litigation and discovery. *Id.*

C. Applying Section 13's Three-Year Statute of Repose as Written Would Not Violate Due Process.

Finally, Petitioner asserts that a refusal to extend *American Pipe* to statutes of repose would compromise opt-out rights in ways that violate due process, Pet.Br.25-29, but that argument fails on a number of levels.

At the outset, Petitioner fundamentally misconstrues the relevant due process interest served by the Rule 23(b)(3) opt-out right. As the court of appeals recognized, the "due process protections of Rule 23 are directed at preventing a putative class member from being bound by a judgment without her consent." Pet.App.5a. That due process interest is fully protected as long as the absent class member is "provided with an opportunity to *remove himself from the class* by executing and returning an 'opt out' or 'request from exclusion' form to the court." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985) (emphasis added). Here, it is undisputed that Petitioner was provided with (and availed itself of) such an opportunity, and thus will not be bound by any judgment or settlement without its consent. That is sufficient to protect the relevant due process interest. *See id.*

But while the Due Process Clause may provide a right to opt out of certain class actions, *but cf.* Fed. R. Civ. P. 23(b)(2), nothing in the Constitution or anything else guarantees that an absent class member will have a viable individual action to opt into. Petitioner's argument to the contrary, *see* Pet.Br.27, has no legal support and proves far too

much. A post-opt-out individual suit may suffer all manner of obstacles, from mootness to lack of jurisdiction to untimeliness to just plain-old lack of merit. Indeed, an absent class member may have the greatest incentive to opt out when the class settlement provides relatively little recovery for her particular kind of claim. In some cases, that paltry recovery may reflect an adequacy problem or lack of diligence on the part of the class representative. But in most cases, the same relatively modest recovery that creates an incentive to opt out flows from a merits difficulty that renders a post-opt-out individual action impractical. That does not create even a hint of a due process problem, and it is no different if the post-opt-out individual action faces a statute of repose problem. The right to opt out of a judgment that the absent class member did not procure satisfies the Due Process Clause wholly apart from whether there is a viable claim to opt into.[11]

Petitioner asserts that "[m]any class members will not even be aware of the lawsuit from which they must opt out until they receive the class notice after the three-year period has already expired." Pet.Br.27. Those class members may still benefit from a class action settlement, but nothing in the Due Process Clause gives them a right to pursue an

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[11] Petitioner (at 25) cites out of context this Court's statement in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999), that "everyone should have his own day in court." *Ortiz* involved a *mandatory* settlement class under Rule 23(b)(1)(B) that did not include *any* opt-out rights. That case thus raised very different issues from the non-mandatory Rule 23(b)(3) class here.

individual action notwithstanding their lack of awareness of any misrepresentation or omission within three years of the public offering of the security. In other words, those relatively unaware class members may get a windfall from the happenstance that some other investor timely filed an action and sought class treatment. But that does not mean they also obtain a free pass to file a belated individual action notwithstanding the clear language of Section 13. "In no event" does not mean "in the event that another investor files a timely action that belatedly provides notice of a misrepresentation but does not provide an optimal recovery to the otherwise unaware investor."

Nor can Petitioner fashion a due process problem out of the reality that it and other opt-out plaintiffs might not have perfect information from which to decide whether to file individual actions or remain in the class. *See* Pet.Br.25-26 (arguing that "it often takes a while before a class member can determine whether the class action will vindicate its interests"). *No litigant* has the luxury of being able to make all of its decisions with perfect foresight. For example, an individual litigant remains bound by the three-year statute of repose even though this rule might force it to bring suit in the face of uncertainty about certain key facts. Having to make a decision while confronted with some uncertainty is a common feature of all litigation—not a due process problem that requires this Court to override an unambiguous statute of repose.

Petitioner's policy arguments rest on the premise that an individual opt-out suit is the *only* way for a

class member to protect itself against an unfair or unreasonable settlement. But that simply disregards Rule 23's myriad protections for those who remain in the class, and the active role the Rule envisions for courts in managing class proceedings throughout. Rule 23(a) requires that the class representatives have claims "typical" of the class, and that they "will fairly and adequately protect the interests of the class." And Rule 23(e) ensures that the class plaintiffs do not settle or dismiss class claims without robust judicial oversight to ensure the fairness of the resolution for the class. Before approving a class settlement, a court must hold a hearing at which all class members who wish to do so have an opportunity to "object to the proposal" at hand. Fed. R. Civ. P. 23(e)(5). The court may then approve the settlement only if it is "*fair, reasonable, and adequate*," Fed. R. Civ. P. 23(e)(2) (emphasis added), and only after engaging in a multi-factor assessment—just as the district court did here. J.A.80-88.

Thus, a class member that does not file an individual action before the running of a statute of repose still has robust rights to ensure that the class settlement is fair, even though she may not have a viable individual action if she opts out. Indeed, as already noted, from the standpoint of smaller investors and the overall interests of the class, it is better to have sophisticated institutional investors like Petitioner inside the class objecting to suboptimal settlements (for the benefit of all class members) rather than opting out seeking a better deal only for themselves.

Finally, it is absurd for Petitioner to suggest (at 28-29) that it was unfairly deprived of the money it otherwise would have received through the class settlement. At the time Petitioner opted out of the settlement, Petitioner should have known to a certainty that the district court would dismiss its individual action as untimely. *See supra* pp.9-10. Petitioner nonetheless rolled the dice and opted out of the class in the hope that its untimely individual suit would be reinstated on appeal. Giving up its bird in the hand (the class recovery) to seek two in the bush (an even-more-lucrative individual settlement) was a calculated gamble by a sophisticated litigant, not a "severe burden" on Petitioner's due process rights. Pet.Br.29.

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At bottom, even if this Court agrees with each and every one of Petitioner's policy arguments, it still should affirm. Petitioner asks this Court to "advance the purposes of the *American Pipe* rule." Pet.Br.15. Respondents, by contrast, ask this Court merely to respect the policy judgments *Congress* has already made in enacting a statute of repose—*i.e.*, a legislative cutoff that grants defendants absolute "freedom from liability" after three years. *Waldburger*, 134 S. Ct. at 2183. At the end of the day, "Congress gets to make policy, not the courts." *Omnicare*, 135 S. Ct. at 1331.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment below.

Respectfully submitted,

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